Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LYNNE ABRAHAM, District Attorney
of Philadelphia County, et al.,
Petitioners

v.

WALTER WASHINGTON YOUNG,
Respondent

Petition for Writ of Certiorari to
the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

May a prisoner challenge a state court sentence in a federal habeas action -- even though that sentence completely expired years earlier -- simply by asserting that he is now in custody on a different sentence that is a "collateral result" of the old sentence?

Does the rationale of Custis v. United States -- which precluded collateral attack on expired state sentences under the Armed Career Criminal Act -- also bar such attack under the Habeas Corpus Act?

PARTIES TO THE PROCEEDING

The petitioners are:

Lynne Abraham, District Attorney of Philadelphia County

Donald Vaughn, Superintendent, State Correctional Institution at Graterford, Pennsylvania

Thomas W. Corbett, Jr., Attorney General of the State of Pennsylvania

The respondent is:

Walter Washington Young

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OPINIONS BELOW

The May 8, 1996, judgment and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the district court, is reported at 83 F.3d 72 (3d Cir. 1996), and is reprinted in the Appendix at App. 1-23. The June 7, 1995, order of the district court, denying habeas review for want of jurisdiction, is unreported but is reprinted in the Appendix at App. 29-30. The May 10, 1995, Report and Recommendation of the United States Magistrate Judge, recommending that habeas review be denied, is unreported but is reprinted in the Appendix at App. 31-34.

STATEMENT OF JURISDICTION

Petitioners seek review of the May 8, 1996, Order of the United States Court of Appeals for the Third Circuit that reversed the June 7, 1995, judgment of the United States District Court for the Eastern District of Pennsylvania denying federal habeas review of an expired state conviction. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241(c)(3), which provides:

> The writ of habeas corpus shall not extend to a prisoner unless --
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent seeks to litigate claims of constitutional error from a trial resulting in a sentence that expired in 1992 -- three years before he filed his federal habeas petition. The United States Court of Appeals for the Third Circuit held that he could, because he is now serving another sentence that was a "collateral result" of the expired sentence.

On October 5, 1984, respondent, Walter Washington Young, entered a negotiated guilty plea to a charge of burglary, for which he was subsequently sentenced to "time-in" (approximately three months) to twenty-three months imprisonment, to be followed by five years of probation (Philadelphia County Court of Common Pleas Bill No. 1402 of June Term, 1984). He did not appeal.

On November 14, 1989, following a bench trial, respondent was tried and convicted of robbery, for which he was subsequently sentenced to one and a half to three years imprisonment (Philadelphia County Court of Common Pleas Bill No. 3711 of February Term, 1989). That sentence expired on February 14, 1992.

Respondent appealed the robbery conviction, contending that trial counsel had provided ineffective assistance. Commonwealth v. Young, 411 Pa. Super. 671, 593 A.2d 916 (1991) (table). The Pennsylvania Supreme Court denied respondent's subsequent request for discretionary review. Commonwealth v. Young, No. 292 E.D. Allocatur Docket 1991.

Respondent then filed a pro se petition for state collateral relief, again in the robbery case, raising the same issue he had forwarded on direct appeal. His petition was denied after appointed counsel filed a no-merit letter. See Pennsylvania v. Finley, 481 U.S. 551 (1987).

Next, in a pro se appeal to the Pennsylvania Superior Court, respondent alleged a mix of old and new ineffective counsel claims. Concluding that respondent's claims were unreviewable because previously litigated or waived under state law, the superior court affirmed in an unpublished memorandum opinion filed on March 31, 1994. Commonwealth v. Young, 435 Pa. Super. 629, 644 A.2d 811 (1993) (table).

Respondent's nunc pro tunc request for discretionary state supreme court review was denied. Commonwealth v. Young, No. 88 E.D. Misc. Docket 1994. This completed state court litigation on the robbery sentence, which had by this point fully expired.

That robbery conviction, however, had constituted a violation of the probation portion of respondent's 1984 burglary sentence, which he was still serving when he committed the robbery in 1989. On March 21, 1990, the trial judge who had presided over the 1984 burglary case revoked respondent's probation and ordered him to serve ten to twenty years of imprisonment. Approximately two weeks later, the court agreed to reconsider

that sentence pending disposition of respondent's appeal in the robbery case. On April 21, 1994, after the robbery appeal was completed, the court imposed a five-to-ten-year prison term for the violation of probation. Respondent filed a timely notice of appeal but subsequently withdrew it. Commonwealth v. Young, No. 2010 Philadelphia 1994.

Thus, before the present habeas proceedings began, respondent had exhausted various claims of error as to the 1989 robbery conviction, but was no longer serving any sentence for that conviction. Conversely, respondent was still incarcerated on the 1994 violation of probation sentence, but had no complaints of error regarding that sentence.

Respondent filed this federal habeas corpus action on February 22, 1995, raising a variety of challenges to the conduct of trial and appellate counsel in the robbery case, for which the sentence had expired three years previously. He made no claims regarding his violation of probation sentence, and did not even mention the burglary conviction from which it arose.

Petitioners answered pursuant to Maleng v. Cook, 490 U.S. 488 (1989), that because the only sentence respondent was challenging -- the robbery sentence -- had been fully satisfied, he was not "in custody" within the meaning of 28 U.S.C. § 2254 and, accordingly, that the petition should be dismissed.

In a Report and Recommendation filed on May 10, 1995, United States Magistrate Judge Charles B. Smith concluded that the petition should be dismissed for lack of jurisdiction (App. 31-34). On the same day the Report and Recommendation was issued, respondent filed a reply to petitioners' response, advising the court

that the expired 1989 robbery sentence had triggered the 1994 violation of probation sentence he was now serving. He argued that federal habeas review was therefore proper. After receiving the Report and Recommendation, respondent filed objections to similar effect.

The district court nonetheless approved and adopted the Report and Recommendation and on June 8, 1995, denied habeas review on jurisdictional grounds (App. 29-30).

The Third Circuit granted respondent's request for a certificate of probable cause (App. 26). On May 8, 1996, after briefing and oral argument, the appeals court reversed. The court declared that a state prisoner may reopen attacks on a final, fully expired judgment of sentence whenever the prisoner comes to be serving a later sentence that is in some sense a "collateral result" of the expired judgment.

The Third Circuit found immaterial this Court's decision in Custis v. United States, 511 U.S. 485, 114 S. Ct. 1732, 128 L.Ed.2d 517 (1994), which held that a state sentence cannot be challenged collaterally under a federal statutory scheme solely because it is the predicate for a later sentence, unless there is a Gideon violation or a specific authorization in the statute. Instead of Custis, the Third Circuit relied on its own, pre-Custis decision in Clark v. Commonwealth of Pennsylvania, 892 F.2d 1142 (3d Cir. 1989), cert. denied sub nom. Castille v. Clark, 496 U.S. 942 (1990); in that case, the Third Circuit had allowed a federal habeas challenge to expired state sentences because the state trial court had noted the existence of those prior convictions in imposing a new sentence that the prisoner was then serving.

The court thus remanded this case to the district court, ordering it to consider respondent's claims of error in the robbery case on which sentence had expired.

The Third Circuit's decision is entirely inconsistent with the rationale underlying this Court's decision in Custis and the concepts of comity and finality that inform this Court's habeas jurisprudence. It is in conflict with the post-Custis habeas decisions of at least one other circuit. And it is at odds with the Congressional intent expressed in the Antiterrorism and Effective Death Penalty Act of 1966, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), 28 U.S.C. § 2244(d)(1), which amended the habeas statute to include a one-year statute of limitations for review of state convictions in an effort to preclude such federal review of remote state convictions as the Third Circuit's decision will allow. For these reasons, petitioners seek this Court's review.

REASONS FOR GRANTING THE WRIT

A state prisoner should not be permitted to resurrect a challenge to a completely expired sentence through federal habeas review on the ground that the expired sentence has had some collateral effect on a subsequent, still-current sentence.

One of the central questions in federal habeas corpus jurisprudence remains without a clear answer from this Court: whether a prisoner can challenge the validity of an already expired sentence merely because he has committed more crimes, the sentences for which are affected by the earlier conviction. The Third Circuit, and several other courts, have endorsed such after-the-fact litigation. To reach that result, the court below

disregarded the import of recent precedent from this Court, intensified a circuit conflict, and undermined legislative efforts to limit habeas attacks on stale convictions.

Although this Court has not specifically resolved the question involved here, it has developed the reasoning that is dispositive of the issue. In Custis v. United States, 511 U.S. 485, 114 S. Ct. 1732, 128 L.Ed.2d 517 (1994), a defendant facing sentencing under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924 (e), sought to challenge the validity of state sentences that would be used to enhance the ACCA sentence. This Court held that the use of the prior sentences in determining the later sentence did not create an automatic right of collateral attack. Instead, the Court concluded that the underlying sentences could be reopened only if the statute under which the defendant was being sentenced expressly authorized such an attack or the state convictions were obtained in the absence of counsel or a valid waiver of counsel, in violation of Gideon v. Wainwright, 372 U.S. 335 (1963).

The Court based this conclusion on explicit analogy to the "principles of finality associated with habeas corpus actions." 511 U.S. at ___, 114 S. Ct. at 1739.[1] The Court relied also on the administrative

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[1] E.g., Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) ("At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation") (Powell, J., concurring opinion); McClesky v. Zant, 499 U.S.

(continued...)

difficulty of requiring judges to "rummage through frequently nonexistent or difficult to obtain state court transcripts or records that may date from another era," id. at 1738-39, in cases that are being resurrected years later merely because the prisoner committed a new offense, placing his criminal history again in issue.

Custis's rationale is fully applicable to the question raised in this and a multitude of other habeas cases. The prisoner's 1989 robbery case is as final as can be. Not only is all appeal concluded, but the sentence has been completely served. The prisoner desires to revisit it now only because he chose to continue his criminal conduct, and his past has caught up with him.

Since there are few, if any, cases in which a sentencing court does not consider a defendant's record in fashioning sentence, there will be few habeas proceedings in which the petitioner could not attempt to reopen moot cases. These expired sentences will typically be years or decades old, implicating precisely the finality and administrative concerns that were decisive in Custis.

Nonetheless, the Third Circuit determined that Custis has no bearing here. The panel relied on the fact that in Custis this Court observed that the defendant could still challenge his prior state sentences through

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[1](...continued)
467, 491 (1991) (according finality to state criminal convictions is a matter of importance in a federal system); United States v. Addonizio, 442 U.S. 178, 184, n.11 (1979) ("Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures").

habeas review. 83 F.3d at 77; App. at 17 (citing Custis, 511 U.S. at ___, 114 S.Ct. at 1739). But that was true in Custis only because the defendant there, unlike the prisoner here, was in actual custody on those state convictions; **he was still serving those sentences**.[2] The fact that habeas review was still available for the defendant in Custis does not mean that it is available for prisoners who wish to resurrect attacks on already expired cases.[3]

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[2]Custis was still on state probation under the enhancing sentence when he was sentenced for his federal crimes. See 1994 WL 663719 at *9.

[3]The court below also attempted to avoid the effect of Custis in another manner. The court held that, even if respondent could not challenge his past conviction, he could still challenge his current conviction, and the district court should so have construed his habeas petition. 83 F.3d at 75-76; App. at 10-12.

But respondent does not **have** any challenges to his current sentence -- except for the fact that it is premised on his past conviction, which he now accordingly wishes to claim was invalid. Thus, the only way respondent can "challenge" his current conviction is by challenging his past conviction.

In reality, then, the two "challenges" would be exactly the same thing -- an examination of errors allegedly occurring during respondent's 1989 robbery trial. The propriety of such litigation is not altered by the expedient of labeling it as a challenge to the current rather than the past conviction.

In place of this facile dismissal of Custis, the proper approach is to apply the analytical framework developed there: that is, is there a constitutional or explicit statutory right to review of expired state sentences merely because they are the basis of a future sentence for a different crime? Custis directly answers the first question: the Constitution requires such review only for Gideon violations. No such violation is alleged here or in the vast majority of cases in the class.

The statutory construction question must turn, of course, on the Habeas Corpus Act. The Third Circuit did not even attempt such an analysis, but there is nothing to support its result in any case. The pertinent statutes, 28 U.S.C. §§ 2241 and 2254, do not expressly authorize collateral attacks on expired state sentences used in later sentencings. Instead the statutes provide for an action by a person "in custody in violation of the Constitution or laws or treaties of the United States." As this Court held in Maleng v. Cook, 490 U.S. 488 (1989), the "in custody" language in the habeas statutes means custody on the conviction or sentence under attack at the time the petition is filed.

Obviously, Congress intended the "custody" requirement to have some meaning and to restrict the class of cases to which habeas jurisdiction would extend. Otherwise, it would have provided for an action by a person claiming he **was convicted** in violation of the Constitution. If the "custody" requirement instead allows challenges to sentences on which a prisoner is **not** in custody, but which were simply used in a subsequent sentencing proceeding, then the statutory language has virtually no effect.

Recent changes to the federal habeas statute emphasize the point. After long concern about stale

attacks on state convictions, Congress has now acted to require a prisoner to seek federal habeas review within one year after his conviction becomes final. The decision of the Third Circuit here creates an enormous loophole in the statute by allowing review of expired sentences so long as the prisoner alleges a connection between present incarceration on a new offense and the prior conviction. Whatever benefits Congress hoped would flow from the expeditious review of state criminal proceedings will be largely illusory.

Despite the clear statutory scheme and the teaching of this Court's recent precedent, a conflict has developed among the circuits that have addressed this issue since Custis.[4] It must be noted that some

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[4]Like the Third Circuit in the present case, the Ninth Circuit rejects Custis as removing constitutional challenges to expired convictions from the purview of federal habeas courts in the context of a challenge to present custody for a different crime. Brock v. Westin, 31 F.3d 887, 890 (1994). But see Clawson v. United States, 52 F.3d 806 (9th Cir. 1995) (holding in proceeding under 28 U.S.C. § 2255 that, following Custis, there is no constitutional right to collaterally challenge constitutionality of a prior conviction used to enhance sentence under ACCA for any reason other than Gideon violation). Compare United States v. Self, 876 F. Supp. 244 (D.Colo. 1995), aff'd, 85 F.3d 641 (10th Cir. 1996) (allowing § 2255 action in which a federal prisoner sought to challenge guilty pleas tendered in two state cases, for which sentences had expired, that had been used in calculating federal sentence under United States Sentencing Guidelines).

(continued...)

uncertainty arises from this Court's per curiam opinion in Maleng v. Cook. Maleng held that a state prisoner does not remain "'in custody' under a conviction after the sentence imposed for it has fully expired, merely because of the possibility [or even the actuality] that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted." 490 U.S. at 492.[5] Yet the opinion then states that it "express[es] no view" on the extent to which an

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[4](...continued)

In contrast, the Eighth Circuit has held that Custis bars derivative habeas challenges despite the effect of a prior conviction on current custody, except where the claimed violation is deprivation of counsel. Partee v. Hopkins, 30 F.3d 1011, 1012 (8th Cir. 1994), cert. denied, 115 S. Ct. 1135 (1995).

The Fifth Circuit has not discussed the effect of Custis, instead simply reiterating its pre-Custis view that expired sentences may be challenged in habeas actions where they collaterally affected a later sentence. Herbst v. Scott, 42 F.3d 902 (5th Cir.), cert. denied 115 S. Ct. 2590 (1995). Without acknowledging Custis, the Eleventh Circuit has continued to allow such challenges to expired sentences in § 2254 actions. White v. Butterworth, 70 F.3d 573 (11th Cir. 1995).

[5]The Court recognized that "[s]ince almost all States have habitual offender statutes, and many States provide ... for specific enhancement of subsequent sentences on the basis of prior convictions, a contrary ruling would mean that a petitioner whose sentence had completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas." 490 U.S. at 492.

expired conviction could be challenged in the context of an attack on a current sentence. 490 U.S. at 494.

What remains indefinite is how the Court's holding in Maleng is distinct from the point on which it purports to express no view. The only reason the prisoner in Maleng, like the prisoner here, sought to challenge an expired sentence was to escape a current sentence that was based on the expired sentence. If Maleng did not preclude such a challenge, it is unclear what it did do. Custis, and the habeas statute itself, help to answer that question, but the circuits are still without sufficient guidance.

To clarify the meaning of its precedent, to resolve inconsistency among the circuits, and to effectuate the controlling statute, this Court should grant review.

CONCLUSION

For these reasons, petitioners respectfully request that a writ of certiorari issue to review the decision below.

Respectfully submitted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1561

WALTER WASHINGTON YOUNG
Appellant

v.

DONALD T. VAUGHN; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania, D.C. Civil Action No. 95-cv-01039

Present: Becker, McKee and McKay*, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 18, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered June 8, 1995, be, and the same is hereby reversed and the cause is remanded to the

District Court for further proceedings consistent with this opinion.

ATTEST:

s/ P. Douglas Sisk
Clerk

Dated: May 8, 1996

*Honorable Monroe G. McKay, Judge of the Court of Appeals for the Tenth Circuit, sitting by designation.

Filed May 8, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1561

WALTER WASHINGTON YOUNG
Appellant

v.

DONALD T. VAUGHN; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania, D.C. Civil Action No. 95-cv-01039

Argued: March 18, 1996

Present: Becker, McKee and McKay,* *Circuit Judges*

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*The Honorable Monroe G. McKay, Judge of the Court of Appeals for the Tenth Circuit, sitting by designation.

ORDER AMENDING OPINION

The opinion in the above-captioned case dated May 7, 1996 is amended as follows:

The file date which is incorrectly printed on the opinion as May 7, 1996 is changed to reflect the correct file date which is May 8, 1996.

Filed May 7, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1561

WALTER WASHINGTON YOUNG
Appellant

v.

DONALD T. VAUGHN; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania, D.C. Civil Action No. 95-cv-01039

Argued: March 18, 1996

Present: BECKER, McKEE and McKAY,* *Circuit Judges*

(Filed May 7, 1996)

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*The Honorable Monroe G. McKay, Judge of the Court of Appeals for the Tenth Circuit, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

Walter Washington Young appeals from the district court's order dismissing his habeas corpus petition for lack of subject matter jurisdiction under 28 U.S.C. §2254. Section 2254 confers jurisdiction on United States district courts to entertain petitions for habeas corpus relief only from persons who are "in custody" in violation of the Constitution or laws or treaties of the United States. The Supreme Court has interpreted this statutory language as requiring that, at the time his

petition is filed, the petitioner must be "in custody" pursuant to the conviction or sentence he seeks to attack. *See Carafas v. LaVallee*, 391 U.S. 234 (1968). Because Young's petition challenges a conviction whose sentence had expired before he filed his petition, the district court, relying on *Maleng v. Cook*, 490 U.S. 488 (1989), held that Young was not "in custody." However, since Young was serving another sentence when he filed his petition -- a sentence that is a collateral result of his expired conviction -- the district court should have construed his petition as challenging that sentence rather than his expired conviction. In so construing Young's petition, a construction in accord with *Maleng*, we hold that Young was "in custody" when he filed it, and hence that the district court had jurisdiction over Young's petition to the extent that it challenges his current sentence.

We also must address the distinct question whether, notwithstanding the district court's jurisdiction over Young's habeas challenge to his *current* sentence, Young may attack his *expired* conviction in the context of this habeas petition. We conclude that because Young's current sentence is a collateral result of his expired conviction, he may do so. *See Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142 (3d Cir. 1989), *cert. denied sub nom. Castille v. Clark*, 496 U.S. 942 (1990). In so holding, we reject the Commonwealth's argument, based on its misreading of *Custis v. United States*, 114 S. Ct. 1732 (1994), that a prisoner may attack a prior expired conviction that is a predicate to his current sentence only if he claims that he was denied his right to counsel in the proceedings resulting in that expired conviction. We therefore reverse the district court's order and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On October 5, 1984, Young pleaded guilty in the Philadelphia County Court of Common Pleas to burglary. On November 14, 1989, while still on probation from his burglary conviction, Young was tried and convicted of robbery and sentenced to one-and-a-half to three years imprisonment. On March 21, 1990, finding that the 1989 robbery conviction violated the terms of Young's probation, Judge Tama Myers Clark revoked Young's probation on the burglary conviction and ordered him to serve ten to twenty years imprisonment. She later vacated that sentence pending disposition of the appeal of the 1989 robbery conviction. Then, on April 21, 1994, Judge Clark imposed a sentence of five to ten years imprisonment for violation of probation, which Young is presently serving.

Having unsuccessfully challenged his 1989 conviction through direct appeal and state collateral attack,[1] Young, acting *pro se*, filed the present habeas

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[1] Young did not appeal his 1984 conviction, but did appeal his 1989 conviction, alleging ineffective assistance of counsel, to the Superior Court. *Commonwealth v. Young*, 411 Pa. Super. 671, 593 A.2d 916 (1991). The Pennsylvania Supreme Court denied Young's request for discretionary review. Young then filed a petition for state collateral relief, which was denied. The Superior Court affirmed, *Commonwealth v. Young*, 435 Pa. Super. 629, 644 A.2d 811 (1993), and the Pennsylvania Supreme Court denied Young's request to file an allocatur petition *nunc pro tunc*.

corpus petition under §2254 on February 23, 1995,[2] alleging ineffective assistance of trial and appellate counsel in connection with his 1989 conviction. Named as respondents are Donald T. Vaughn, the Attorney General of the State of Pennsylvania, and the District Attorney for Philadelphia County (collectively "the Commonwealth"). Although the petition makes no reference to the 1984 conviction, Young did explain the relationship between the two convictions and his present incarceration in his "Response to Respondent's Response to Petition for Writ of Habeas Corpus," in which he contends:

> Petitioner is entitled to federal habeas corpus relied [sic] since the expired conviction and sentence provided the basis for Judge Clark's revoking petitioner's probation and imposing the sentence now being served.

Id. at 2.

Although the district court apparently did not receive this document until after the magistrate judge filed his Report and Recommendation, the magistrate judge discovered on his own initiative that Young was incarcerated even though the 1989 sentence had expired, and addressed the possibility that the sentence Young was serving had been partly the result of the 1989 conviction. However, he concluded that

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[2]Young originally filed this petition in May 1994 but was allowed to withdraw it to exhaust his post-conviction remedies.

> even if that sentence was used to enhance the sentence for [sic] which he is now serving, under *Maleng* petitioner would still not satisfy the "in custody" requirement to attack that conviction.

The magistrate judge therefore recommended that the petition be dismissed for lack of jurisdiction. Young filed objections to the Report and Recommendation in which he again explained the connection between the convictions and his present incarceration. However, the district court adopted the Report and Recommendation and dismissed the petition for lack of jurisdiction.

Young filed a timely notice of appeal. We granted a certificate of probable cause and appointed counsel for him. We have jurisdiction under 28 U.S.C. §1291. Our review of the district court's legal conclusions, including its determination of jurisdictional issues, is plenary. *See United States v. Luther*, 954 F.2d 910 (3d Cir. 1992).

II. YOUNG'S CHALLENGE TO HIS CURRENT SENTENCE

A. *Maleng v. Cook*

The Commonwealth contends that under *Maleng v. Cook*, 490 U.S. 488 (1989), the district court lacks jurisdiction; hence, we must examine that case. Cook, the petitioner in *Maleng*, was convicted of robbery in 1958 in state court and was sentenced to twenty years imprisonment. *Id.* at 489. While on parole from that sentence, he was convicted of three state crimes and, in 1978, was sentenced to two life terms and one ten year term. *Id.* The 1958 conviction increased by several

years the mandatory minimum term Cook was required to serve. *Id.* Cook was also convicted of a federal crime while on parole, and that sentence was to be served before the 1978 state sentences. *Id.* While in federal prison, Cook filed a habeas corpus petition attacking the 1958 conviction, claiming that it had been used illegally to enhance the 1978 state sentences. *Id.* The district court dismissed the petition for lack of jurisdiction because, having served that sentence, Cook was not "in custody" for the purposes of an attack on the 1958 sentence. *Id.* at 490.

The Court of Appeals reversed. It held that Cook was "in custody" under the 1958 conviction because that conviction had been used to enhance the length of his sentences for his 1978 convictions. *Cook v. Maleng*, 847 F.2d 616, 618-19 (9th Cir. 1988). The Supreme Court affirmed, but differed from the Court of Appeals in its reasoning: "We think that [the Court of Appeals'] interpretation stretches the language 'in custody' too far." *Maleng*, 490 U.S. at 491. The Court observed that it had

> never held ... that a habeas petitioner may be "in custody" under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed.

Id. A petitioner does not remain "in custody" under a conviction, the Court held,

> after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any

> subsequent crimes of which he is convicted.[3]

Id. at 492.

Nevertheless, the Court did not reverse the Court of Appeals' decision because, under *Peyton v. Rowe*, 391 U.S. 54 (1968), Cook could be considered "in custody" for the 1978 sentences, even though he had not started serving them. The Court construed his petition, "with the deference to which *pro se* litigants are entitled," as challenging the 1978 sentences. *Id.* at 493. The Court expressed "no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentences which it was used to enhance." *Id.* at 494.

B. Application of *Maleng* to this Case

In the present case, the district court has jurisdiction over Young's petition for the same reasons the Supreme Court found jurisdiction in *Maleng*: although the district court lacks jurisdiction over a direct challenge to Young's 1989 conviction, it should have construed Young's petition as attacking the sentence he is currently serving. *See* 490 U.S. at 493-94. While Young's petition referred only to his expired 1984 conviction, his subsequent filings provided sufficient information concerning both his 1984 and 1989 convictions and their relationship to his present sentence to support

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[3]It apparently made no difference to the Court that the 1958 conviction actually enhanced Cook's sentence for his subsequent conviction. *Id.*

such a construction.[4] Moreover, the purpose of Young's petition is presumably to terminate the sentence he is presently serving.

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[4]The Commonwealth argues that, because Young did not fully apprise the court of the relationship between his 1989 conviction and his present custody until after the Report and Recommendation was filed, Young effectively waived such a claim. This argument has no merit. As noted above, the various documents that Young filed after the magistrate judge filed his Report and Recommendation explain the relationship between his sentences and convictions. Not only should a "habeas petition [be] construed with the deference to which *pro se* litigants are entitled," *Maleng*, 490 U.S. at 493, but Fed. R. Civ. P. 15(a) states that "leave shall be freely given when justice so requires" to a party seeking to amend his pleadings. The Commonwealth made no waiver argument in response to Young's objections to the Report and Recommendation and has cited nothing to support its implied contention that a petitioner may not seek to amend his petition after the Report and Recommendation has been filed. Since the district court must review a Report and Recommendation *de novo* if the petitioner files objections to it, 28 U.S.C. §636(b)(1), it is immaterial whether the *magistrate judge* was in a position to construe the petition as attacking the 1984 conviction. Besides, as noted above, the magistrate judge effectively addressed the argument Young raised in his objections to the Report and Recommendation, albeit hypothetically, finding that even if the sentence Young was serving had been enhanced as a result of the 1989 conviction, he was not in custody under that conviction.

It is true that the circumstances of Young's incarceration do not follow the usual *Maleng* pattern of conviction A, whose sentence has been served, followed by conviction B, whose sentence is enhanced because of conviction A. *See* 490 U.S. at 489; *see also Tredway v. Farley*, 35 F.3d 288, 292 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 941 (1995); *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990); *Collins v. Hesse*, 957 F.2d 746, 747 (10th Cir. 1992); *White v. Butterworth*, 70 F.3d 573, 574 (11th Cir. 1995). However, as the Commonwealth concedes, the differences do not render *Maleng* inapplicable. Young is presently serving a sentence which he plainly seeks to terminate and under which he is currently "in custody." Thus, we hold that Young's petition should have been construed as challenging his current sentence, that he is "in custody" under that sentence, and that the district court has jurisdiction over Young's petition. *See Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994) (construing petitioner's attack on expired conviction allegedly used as a predicate for his confinement under the Washington Sexually Violent Predators Act as an attack on that confinement).

III. YOUNG'S CHALLENGE TO HIS PAST CONVICTION

A. *Custis* and *Clark*

To find that the district court had jurisdiction over Young's petition under *Maleng* is not also to say that Young may challenge his expired 1989 conviction in an attack on his current sentence. That is a question expressly left unanswered in *Maleng*, 490 U.S. at 494. The Commonwealth contends that in *Custis v. United States*, 114 S. Ct. 1732 (1994), the Supreme Court answered this question in the negative, holding that a

prisoner may not attack a prior expired conviction used to enhance his current sentence unless he claims that he was denied his right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), in the proceedings resulting in that expired conviction. According to the Commonwealth, *Custis* bars Young from challenging his 1989 conviction because he merely alleges ineffective assistance of counsel rather than denial of his right to counsel under *Gideon*. *See Custis*, 114 S. Ct. at 1738. Therefore, under the Commonwealth's argument, not only did the district court not err in failing to construe Young's petition as attacking his current sentence, it should have dismissed the petition even if it had found jurisdiction.

If the Commonwealth is correct, *Custis* effectively overrules *Clark v. Commonwealth of Pennsylvania*, 892 F.2d 1142 (3d Cir. 1989), *cert. denied sub nom. Castille v. Clark*, 496 U.S. 942 (1990), a case curiously cited by neither party but in which we answered the question left open in *Maleng*. We held there that, although the district court lacked jurisdiction over Clark's petitions attacking two convictions whose sentences had expired, we could review those sentences because of their collateral enhancement of the sentence that Clark was still serving. *Id.* at 1143 n.2 & 1145.[5]

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[5]Clark was convicted of two sexual assault charges in 1974; he completed the sentences for both crimes in 1978. In 1979, he was found guilty of rape and other offenses. In imposing the new sentence, the judge took into consideration the two 1974 convictions. Clark filed three separate petitions seeking federal habeas corpus relief from all three state convictions. The district court reviewed all of his petitions but found that they lacked

(continued...)

In support of their interpretation of *Custis*, the Commonwealth cites *Partee v. Hopkins*, 30 F.3d 1011, 1012 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1135 (1995), wherein the court stated that in *Custis*

> the Supreme Court held that there is no federal constitutional right to collaterally attack a prior conviction used to enhance a sentence on any constitutional ground other than failure to appoint counsel for an indigent defendant.

Partee applied this principle to a habeas corpus petitioner seeking to attack a state sentence that had been enhanced by two prior state convictions.

We are not persuaded by either *Partee* (whose entire discussion of the point is contained in two sentences) or the Commonwealth's characterization of *Custis*. In *Custis*, 114 S. Ct. at 1734, the Supreme Court addressed only the narrow question whether a defendant may collaterally attack prior state convictions used to enhance his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e), during sentencing proceedings under the Act. The Court held that Congress, in enacting the ACCA, did not intend to permit collateral attacks on prior convictions during sentencing proceedings under the Act. *Custis*, 114 S. Ct. at 1735-37. The Court also rejected the defendant's argument that the Constitution required such collateral

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[5](...continued)
merit; Clark filed a notice of appeal. In the meantime, the Supreme Court decided *Maleng*, following which Clark conceded that the district court did not have jurisdiction to consider the merits of the 1974 convictions.

attacks. *Id.* at 1737-39. The Constitution, the Court said, requires only that collateral attacks based on a failure to appoint counsel in violation of *Gideon* be heard at sentencing. *Id.* Thus, " §924(e) [did] not permit Custis to use the federal sentencing forum to gain review of his state convictions." *Id.* at 1739.

Importantly, however, the Court's conclusions regarding the ACCA and the Constitution did not preclude Custis from challenging his prior convictions through a habeas petition. The Court noted that

> Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under §924(e), *may attack his state sentences in Maryland or through federal habeas review.*

Id. at 1739 (emphasis added). If he is successful, the Court explained, he may then challenge his enhanced federal sentences. *Id.* Indeed, as noted in *Brock*, 31 F.3d at 890,

> [t]he Court's constitutional holding was, as its citation to *Maleng* evidences, clearly premised on the fact that collateral attacks based on other defects may be heard on habeas review.

Even more importantly, the Court said nothing about whether a prisoner may use a federal habeas petition to attack an expired state conviction in the context of challenging his current state sentence that was enhanced or otherwise affected by the expired conviction. *Custis*, in other words, did not address the

question left unanswered in *Maleng* and therefore does not affect our decision in *Clark*. Consequently, we decline to follow *Partee*'s interpretation of *Custis*, which appears to be shared by no other court of appeals, and reject the Commonwealth's argument that *Custis* bars Young from attacking his 1989 conviction. If a general principle is to be derived from *Custis*, it is the much narrower one that "federal *sentencing hearings* are not the proper forum for addressing the validity of prior convictions." *United States v. Billops*, 43 F.3d 281, 288 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1389 (1995) (emphasis added); *see also United States v. Morning*, 64 F.3d 531, 536 (9th Cir.1995), *cert. denied*, 116 S. Ct. 1030 (1996).

B. (Non)Application of *Custis*; Application of *Clark*

Together with *Maleng*, *Clark* controls the outcome of the present appeal. As explained above, *Maleng* requires the district court to construe Young's petition as attacking the sentence he is presently serving, thereby granting it jurisdiction over Young's petition. Under *Clark*, a federal habeas petitioner in custody under a sentence enhanced by a prior conviction may attack that prior conviction, even if he is no longer in custody for it. However, he may do so only in the context of a challenge to the enhanced sentence for which he is in custody. In other words, a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence.

In all important respects Young's petition falls under *Clark*: he seeks by habeas to attack a conviction whose sentence has expired but which caused the

sentence he is presently serving. Thus, he may attack the expired conviction in the context of his challenge to his current sentence. As noted above, it is true that the relationship between Young's convictions and sentences is unusual. Instead of *enhancing* a subsequent sentence (as in *Maleng*, *Clark*, and most of the other cases cited in this opinion), Young's expired 1989 conviction constituted a parole violation in his 1984 conviction, thereby serving as a *predicate* for his present prison sentence. However, this difference only makes Young's case stronger: but for his 1989 conviction, he would not be in prison or otherwise "in custody" at all. Young's confinement is thus even more closely related to his 1989 conviction than if it were merely the result of a sentence enhanced by that conviction. As the court noted in *Brock*:

> With an enhanced sentence the prior conviction only lengthens the period of confinement; here, the prior conviction is a necessary predicate to the confinement. If anything, it is even more appropriate for a court to examine an expired conviction in the present circumstances than for it to do so in the context of an enhanced sentence.[6]

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[6]In *Brock*, the petitioner pleaded guilty in 1974 to second degree assault; his sentence expired in 1984. In 1991, the State of Washington filed a petition for commitment alleging that Brock was a "sexually violent predator" within the meaning of the Washington Sexually Violent Predators Act. The state court ordered Brock's indefinite confinement. His 1974 conviction was allegedly a predicate of that petition for

(continued...)

31 F.3d at 890.

To allow Young to attack his expired conviction in this manner is not unusual. Every court of appeals to confront the question allows a habeas petitioner to challenge a conviction whose sentence has expired if he is currently incarcerated as a result of that conviction, or if it was used to enhance a sentence presently being served. Most share our approach in *Clark*, interpreting *Maleng* as requiring the petitioner to do so by attacking his current sentence. *See, e.g., Tredway v. Farley*, 35 F.3d 288 (7th Cir. 1994); *Crank v. Duckworth*, 905 F.2d 1090 (7th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991); *Taylor v. Armontrout*, 877 F.2d 726 (8th Cir. 1989); *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994); *Feldman v. Perrill*, 902 F.2d 1445 (9th Cir. 1990); *Collins v. Hesse*, 957 F.2d 746 (10th Cir. 1992); *Gamble v. Parsons*, 898 F.2d 117 (10th Cir.), *cert. denied*, 498 U.S. 879 (1990).[7] With the possible exception of the

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[6](...continued)
commitment. *Id.* at 888-89. The district court dismissed Brock's petition for lack of jurisdiction. The court of appeals reversed and remanded, instructing the district court that if it reached the merits, it should determine whether the expired conviction served as a predicate for Brock's current commitment. *Id.* at 891. In the present case, there is no dispute that Young's 1989 conviction was the predicate for his current incarceration.

[7]The Court of Appeals for the Fifth Circuit takes a somewhat different approach: in order to challenge a conviction with an expired sentence, it is sufficient for the petitioner to allege a "positive and demonstrative"
(continued...)

Eighth Circuit's decision in Partee, we are aware of no case holding that a prisoner in custody under a sentence resulting from (or enhanced by) a conviction whose sentence has expired may not attack the prior conviction at all.

The only disagreement concerns how he may attack that conviction. The Courts of Appeals for the Fifth and Eleventh Circuits apparently allow the expired conviction to be attacked directly, in contrast to most courts of appeals, which require an attack upon the sentence currently being served. In practice, however, it

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[7](...continued)
nexus between the expired sentence and a current enhanced sentence; if he does, the petitioner may directly attack the former conviction. *Willis v. Collins*, 989 F.2d 187, 189 (5th Cir. 1993); *accord Young v. Lynaugh*, 821 F.2d 1133 (5th Cir.), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503 (1987); *Allen v. Collins*, 924 F.2d 88 (5th Cir. 1991). The Court of Appeals for the Eleventh Circuit, on the other hand, has held that it makes no difference whether the petitioner attacks the expired or the enhanced sentence:

> This is a distinction without a difference. Whether or not the petition is framed facially in terms of an attack on the enhanced sentence or the expired sentence, the reality is that Harper is "in custody" as a result of a prior and alleged illegal conviction.

Harper v. Evans, 941 F.2d 1538, 1539 (11th Cir. 1991); *accord White v. Butterworth*, 70 F.3d 573 (11th Cir. 1995); *Battle v. Thomas*, 923 F.2d 165 (11th Cir. 1991).

makes little difference how the petitioner states his claim because, with one exception, the courts of appeals that share our approach in *Clark* follow *Maleng*, as we have done here, and construe habeas petitions that appear to attack only the expired sentence as attacking the current sentence instead.[8] The expired conviction may then be attacked as having improperly enhanced or resulted in the present sentence. *See, e.g., Gamble*, 898 F.2d at 117; *Brock*, 31 F.3d at 887.[9]

IV. CONCLUSION

Following *Maleng*, we hold that the district court erred in failing to construe Young's petition as attacking his present sentence. We construe Young's petition as doing so, and find that the district court has jurisdiction to entertain his habeas petition. Following *Clark*, we hold that Young may attack his 1989 conviction in the context of his challenge to the sentence he is presently serving. Accordingly, the order of the district court dismissing Young's habeas petition for lack of jurisdiction will be reversed and the case remanded to the district court for further proceedings consistent with this opinion. We express no opinion as to whether Young

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[8] *Clark* did not confront this issue because Clark filed separate habeas petitions attacking all his sentences.

[9] The exception is the Court of Appeals for the Eighth Circuit, which requires the district court to dismiss petitions attacking only the completed conviction without prejudice to filing a subsequent petition attacking the present, enhanced sentence. *See Taylor v. Armontrout*, 877 F.2d at 726. We decline to follow that policy as it involves unnecessary use of scarce judicial resources.

has exhausted his state court remedies or whether the claims in his petition have merit.

A True Copy:
Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1561

Young

v.

Vaughn

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 6, 1996.

s/ Edward R. Becker
Circuit Judge

Dated: JUL 03 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1561

Young

v.

Vaughn

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 28, 1996.

s/ Edward R. Becker
Circuit Judge

Dated: JUN 13 1996

July 20, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 95-1561

WALTER WASHINGTON YOUNG

vs.

DONALD T. VAUGHN, ET AL.

(E.D. Pa. Civ. No. 95-cv-01039)

Present: BECKER, ROTH and SAROKIN,
CIRCUIT JUDGES

Submitted are:

(1) Appellant's request for a certificate of probable cause and memorandum in support pursuant to Rule 22(b), Federal Rules of Appellate Procedure and LAR 22.1; and

(2) Appellant's supplemental memorandum in support of a certificate of probable cause

in the above captioned case.

Respectfully,

s/ P. Douglas Sisk/SR
Clerk

ORDER

The foregoing request for a certificate of probable cause is granted

By the Court,

s/ Edward R. Becker
Circuit Judge

Dated: SEP 22, 1995

cc: Salvatore C. Adamo, Esq.
Mr. Walter Washington Young
Deborah Fleisher, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

WALTER WASHINGTON YOUNG	:	CIVIL ACTION
v.	:	
DONALD T. VAUGHN, et al	:	NO. 95-1039

FILED JUN 30 1995

ORDER

AND NOW, this 10 day of July, 1995, upon consideration of plaintiff's affidavit in support of motion to proceed in forma pauperis, it is hereby ORDERED that plaintiff is GRANTED leave to proceed on appeal in forma pauperis.

s/ Thomas N. O'Neill, Jr.
J.

ENTERED: 7-11-95
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

WALTER WASHINGTON YOUNG	:	CIVIL ACTION
v.	:	
DONALD T. VAUGHN and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY	:	NO. 95-1039

FILED JUN 7 1995

ORDER

AND NOW, this 7th day of June, 1995, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED. Maleng v. Cooke, 490 U.S. 448 (1989), governs. Garlotte v. Fordice, ___ U.S. ___, (May 30, 1995) does not apply as petitioner is not serving consecutive sentences.

2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, is DISMISSED for lack of jurisdiction.

There is no probable cause for appeal.

It is so ORDERED.

s/ Thomas N. O'Neill, Jr.
J.

ENTERED: 6-8-95
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

WALTER WASHINGTON YOUNG,	:	CIVIL ACTION
Petitioner	:	
	:	
v.	:	
	:	
DONALD T. VAUGHN, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA AND THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY,	:	
Respondents	:	NO. 95-1039

FILED: MAY 10 1995

REPORT AND RECOMMENDATION

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

PROCEDURAL HISTORY

This is a pro se Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. §2254. For the reasons which follow, it is recommended that the petition be denied and dismissed.

On November 14, 1989, petitioner was convicted of robbery after a bench trial before the Honorable Joseph D. O'Keefe of the Philadelphia Court of

Common Pleas.[1] Commonwealth v. Young, No. 3711, February Term, 1989. Judge O'Keefe sentenced petitioner to one and one-half to three years incarceration. According to the petition, petitioner apparently filed direct appeals to both the Superior and Supreme Courts of Pennsylvania which were denied. He also filed a Post-Conviction Relief Act (PCRA) petition which was also dismissed in March, 1994. Petitioner's sentence on the robbery conviction expired on February 14, 1992.[2]

On February 22, 1995, petitioner filed the instant habeas petition claiming that his appellate counsel was ineffective for failing to argue that trial counsel was ineffective for various reasons.

DISCUSSION

The federal habeas statute gives the United States District Courts jurisdiction to entertain petitions for habeas relief only from persons who are "in custody in

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[1]The procedural history, as outlined, was compiled from a review of petitioner's Petition for Writ of Habeas Corpus, the response of the Philadelphia County District Attorney, and the state court record.

[2]This information was obtained by the Philadelphia District Attorney's Office from Records Supervisor Thomas Rowlands at the State Correctional Institute at Graterford. A phone call from this office to Mr. Rowlands verified this information and we were also informed that the petitioner is currently incarcerated there serving a five to ten year sentence on a different conviction for burglary imposed by the Honorable Tama Myers Clark of the Philadelphia Court of Common Pleas in March 1990.

violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2241(c)(3); see also, 28 U.S.C. §2254(a).

The United States Supreme Court has interpreted the statutory language as requiring a petitioner to be "in custody" under the "conviction or sentence under attack at the time his petition is filed." Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 1560 (1968). The Court in Maleng v. Cooke, 490 U.S. 488, 491, 109 S.Ct. 1923, 1925 (1989), stated that although

> our interpretation of the "in custody" language has not required that a prisoner be physically confined in order to challenge his sentence, e.g. prisoner could be on parole and still be "in custody," we have never held that a "habeas petitioner" may be "in custody" under a conviction when the sentence imposed for that conviction has fully expired at the time the petition is filed.

The Maleng Court went further and held that a habeas petitioner does not remain "in custody" under conviction after the sentence imposed has fully expired merely because of the possibility that a prior conviction could be used to enhance sentences imposed for any subsequent convictions. Id. at 492.[3]

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[3]It must be noted that petitioner does not allege in this habeas petition that his 1989 conviction for robbery was used to enhance the sentence he is now serving. It is only through our contact with Graterford Prison did we find out he is serving another sentence.

In this case, petitioner's sentence for the conviction he is challenging was fully expired before he filed this petition. In addition, even if that sentence was used to enhance the sentence for which he is now serving, under Maleng, petitioner would still not satisfy the "in custody" requirement to attack that conviction. Thus, petitioner is not "in custody" and this petition should be dismissed for lack of jurisdiction.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this 10th day of May, 1995, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, be DISMISSED for lack of jurisdiction. There is no probable cause for appeal.

s/ Charles B. Smith
United States Magistrate Judge

ENTERED: 5-11-95
CLERK OF COURT